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NOS. 159 AND 576

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

CHICAGO AND NORTH WESTERN RY. CO., *et al.*, *Appellants*,
v.
THE ATCHISON, TOPEKA AND SANTA FE RY. CO., *et al.*, *Appellees.*
No. 159

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*,
v.
THE ATCHISON, TOPEKA AND SANTA FE RY. CO., *et al.*, *Appellees.*
No. 576

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

Appellees listed in Appendix A hereto move, pursuant to Rule 16 of the Revised Rules of this Court, that the part of the Judgment of the District Court which is not moot be affirmed on the ground that the Judgment below is so clearly correct that plenary review by this Court is not warranted.

QUESTIONS PRESENTED

As stated by both groups of appellants, the primary question presented is whether the district court erred in requiring the Interstate Commerce Commission to make findings with respect to each of more than 300 railroads

in prescribing divisions of rates on transcontinental freight shipments. This is not a genuine issue. In actual context, the initial question presented by this case is whether the district court properly set aside an order of the Commission for lack of adequate findings where the Commission, acting under a statute which requires consideration of "the amount of revenue required" by the several carriers, prescribed unexplained and unrelated divisions for the express purpose of reflecting "revenue needs," but without finding what the revenue needs are for any group of carriers and without finding what effect the prescribed divisions would have on the revenue needs of the carrier groups.

So far as individual carriers are concerned, the question presented is whether such findings should *also* have been made with respect to the three (not 300 but 3) carriers whose revenues would have been disproportionately affected by the unique impact of the prescribed divisions upon them.

Numerous additional questions are involved in these cases, some of which relate to issues which were decided by the district court, while others relate to issues not reached by the district court. Of the three Jurisdictional Statements filed before this Court in these two cases and the related case No. 143 which is now moot, only that of the Eastern railroads in the moot case purports to present questions covering all of the issues before the district court. At the other extreme the Government raises a single question, dealing only with one aspect of the district court's holding, while the Midwestern railroad appellants, although presenting a number of questions, do not challenge at least one of the grounds upon which the district court rested its decision nor request this Court to pass upon the issues reserved by the district court. Accordingly, the questions before the Court are not sufficient to alter the judgment of the district court, even if all the questions presented by the

active appellants were decided in the manner they contend for. In this situation, the question is presented whether, in any event, a case is worthy of plenary consideration by this Court where an independent ground upon which the decision was rested in part by the district court, and upon which it may stand alone, is not challenged by the appellants.

Finally, aside from the additional questions raised by alternative grounds of the district court's decision, an intensely practical question of judicial administration arises from the action of the Commission itself in another major divisions case decided subsequent to the decision in the district court below. In *Official-Southern Divisions,* 325 I.C.C. 1 (1965), the Commission abandoned the unlawful methods which it persists in defending in this case. The further question thus presented is whether this Court should prolong this litigation by granting plenary review of an administrative order that is not only plainly unlawful but has also been repudiated in principle by a subsequent action of the agency itself.

STATEMENT

As originally filed, the proceedings before the Commission involved the divisions as between Mountain-Pacific, Midwestern and Eastern railroads of virtually all of the revenues accruing from transcontinental freight shipments. As such, the case was of vital concern to the several appellee railroads serving Mountain-Pacific territory because these appellees are dependent for approximately one-half of their entire freight revenues upon their share of the revenues from transcontinental shipments. In its reports and orders dated March 21, 1963, and December 31, 1963, the Commission declared the existing bases for dividing these revenues unlawful and prescribed new bases

of divisions which would drastically reduce the divisions of the Mountain-Pacific railroads for the benefit of railroads serving the East and Midwest. The new divisions prescribed by the Commission are set forth in Appendices to its reports. For the East, the Appendices (B and B-1) prescribe a series of unrelated and unexplained percentages to divide the revenues east and west of such points as Chicago, Peoria and St. Louis (B&O J.S. 111a-113a, 162a-65a).[1] For the Midwest, the Appendices (C and C-1) prescribe "Scales of Divisional Factors" to be used in calculating the percentages of transcontinental revenues to be accorded Midwestern railroads (B&O J.S. 114a-117a, 167a-170a). The cumulative effect of these new divisions upon the Mountain-Pacific railroads was not found, or even estimated, in the Commission's reports but one of the dissenting Commissioners speculated that the revenue loss to these several appellees "would exceed $50 million annually" (B&O J.S. 107a).

After the three-judge court below had set aside the orders of the Commission and its Judgment had been appealed to this Court, a settlement agreement was reached between all the appellee railroads and all Eastern railroads (appellants in No. 143). On October 20, 1965, the settling railroads filed a Joint Petition with the Commission requesting that the Commission vacate its orders insofar as they prescribe divisions covered by the agreement. By order

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[1] Although the appeal in No. 143, *Baltimore and Ohio R. Co., et al.* v. *Atchison, T. & S. F. Ry. Co., et al,* is now moot (see Memorandum Suggesting that the cause in No. 143 is Moot and that the cause in No. 576 is partially Moot, filed concurrently with this Motion to Affirm), the references to the reports of the Commission and the opinion of the district court are necessarily to pages of the Appendix to the Jurisdictional Statement filed in that appeal, for the appellants in No. 159 and 576 did not separately print these documents.

dated January 7, 1966, this Petition for Vacation of Orders was granted and, accordingly, the controversy between the appellee railroads and the Eastern railroads is now moot. A separate suggestion of mootness in No. 143, and in that part of the appeal of the United States and Interstate Commerce Commission (No. 576) dealing with the divisions prescribed for the Eastern railroads, is being filed concurrently with this Motion to Affirm.

After the settlement agreement was reached between the appellee railroads and the Eastern railroads with respect to their divisions of revenues which would have been subject to Appendices B and B-1 of the Commission's orders, similar but separate agreements were entered into between the appellee Mountain-Pacific railroads and 18 railroads operating in the Midwest with respect to the revenues which would have been subject to Appendices C and C-1.[2] The railroads operating in the Midwest who are parties to this settlement represent approximately two-thirds of the Midwestern participation in transcontinental traffic. This settlement agreement specifically provides that it is open to all Midwestern railroads on the same terms, but eight of the Midwestern railroads who are appellants in No. 159 have not joined the agreement (appellant Chicago, Rock Island and Pacific Railroad Company has joined). A petition to vacate Appendices C and C-1 of the Commission's orders insofar as they would apply to the revenues of assenting railroads operating in the Midwest is now pending before the Commission.

By virtue of the settlements which have been made, the active controversy presently before this Court constitutes

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[2] Five of these Midwestern railroads are affiliated with Mountain-Pacific railroads, one is under contract to merge with a Mountain-Pacific railroad and 12 are independent railroads operating in whole or in part in the Midwest.

a mere fragment of the original *Transcontinental Divisions* case, both with respect to the number of parties actually involved in the controversy, and with respect to the scope of the issues upon which the case turns. In its present posture, by far the most important issue in the case is the lawfulness of the divisional scales prescribed in Appendices C and C-1 of the Commission's reports for application as between Mountain-Pacific and Midwestern railroads. The only other issue of any importance to the active appellant Midwestern railroads is the 15 percent minimum division prescribed by the Commission on transcontinental freight traffic to and from Southeastern Illinois (B&O J.S. 100a-101a). Thus, the basic question before this Court is whether the district court's Judgment setting aside these two parts of the Commission's order is so clearly correct that plenary review by this Court is not warranted. Appellees submit that the Judgment of the district court is that clearly correct in both of these respects.

I. THE COMMISSION'S ORDERS WERE PROPERLY SET ASIDE FOR VIOLATION OF SECTION 8(b) OF THE ADMINISTRATIVE PROCEDURE ACT.

The district court properly set aside the Commission's order as violating Section 8(b) of the Administrative Procedure Act which requires that the Commission state its "findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record" (5 U.S.C. § 1007(b)). This Court has emphasized the importance of enforcing this statutory requirement, lest the Commission "become a monster which rules with no practical limits on its discretion." *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 167 (1962).

A. The Commission Violated Section 8(b) in Prescribing Divisions Expressly to Reflect Revenue Needs Without Finding Either the Extent of the Needs Involved or the Financial Effect of its Orders.

The Commission's orders prescribed radically new divisions of transcontinental freight revenues under a statute requiring consideration of the "amount of revenue required" by the carriers concerned (49 U.S.C. § 15(6)). The Commission stated that the cost evidence "does not provide an acceptable pattern for readjusting the existing divisions, which must reflect certain broader aspects of revenue need." (B&O J.S. 95a). Yet the Commission did not find what the revenue needs of the respective carriers are. And it did not find what effect the new divisions would have on such unmeasured revenue needs. No such findings were made even on a "group basis," much less with respect to any individual carriers. This is a fundamental error which vitiates the Commission's action.

By refusing to make any such findings, the Commission would change carrier revenues by unstated and undetermined amounts for the purpose of meeting unstated and undetermined revenue needs. To uphold such administrative action would turn the making of divisions into a game of blindman's buff.

Appellants do not, and cannot, contend that the amount of the revenue needs of the carriers, and the effect of the new divisions upon those revenue needs, are not "material issues" within the meaning of Section 8(b) of the Administrative Procedure Act. They plainly are "material issues" in this case in which divisions from transcontinental freight traffic provide the lifeblood of the Mountain-Pacific railroads, and where the Commission expressly stated that it based the new divisions upon "revenue needs."

Nor can appellants claim that findings were made on these material issues. Appellants argue that findings as to rates of return are sufficient (U.S. J.S. 14-15; C&NW J.S. 16-17). This is plainly incorrect because rates of return do not measure the "amount of revenue required" but, instead, reflect what carriers *actually* earned for the period covered. Rates of return actually earned do not reflect the "fair return" which is an integral part of the "amount of revenue required" as expressly defined by Section 15(6). Nor do they reflect the amount of revenue needed for capital improvements and other investments necessary to meet service obligations in a growing territory. Since appellees expressly relied upon these factors in their presentation to the Commission, the Commission was clearly obligated either to find revenue needs in terms of dollar amounts or to explain why some other measure of those needs would suffice under the circumstances of the case. It did neither. The district court was therefore eminently correct in condemning this failure to make any findings in any terms which rationally resolved the issue before the Commission.

But even if rates of return were sufficient to measure the "amount of revenue required," appellants do not claim that the Commission found, in any form, the effect of the divisions which they prescribed upon the "amount of revenue required" by the carriers. Without finding the financial effect of new divisions prescribed to reflect revenue needs, the Commission cannot rationally determine that the revenues under the new divisions would satisfy the revenue needs of the carriers, and thus be "just, reasonable and equitable" in light of the "amount of revenue required" as required under Section 15(6). Such a lack of findings on obviously material issues constitutes a plain violation of

the requirements of Section 8(b) of the Administrative Procedure Act.

The Government itself recognizes the imperative necessity of a finding of the financial effect of the Commission's orders when, in its own description of the proceedings before the Commission, it states (U.S. J.S. 4): "the shift in revenues which would result from the new divisions would be approximately $45 million a year. (B&O J.S. 107a)." The Government dramatically highlights a glaring deficiency in the Commission's action when it is recognized that to provide any support for the figure of "$45 million a year" the Government was compelled to cite the following equivocal statement by one of the four dissenting Commissioners (B&O J.S. 107a):

> "Although the report is silent as to the actual amount of revenue the prescribed divisions would shift from the transcontinental lines to eastern and midwestern carriers, estimates indicate the figure would exceed $50 million annually."

The source of these "estimates" is not known. This statement of a dissenting Commissioner, and the Government's citation of this statement as the sole support for its assertion of a material fact in its Jurisdictional Statement, underscores the lack of a rational basis for an administrative order that disposes of vast sums of money on the asserted basis of revenue needs without finding what those revenue needs are or how they would be affected by the order.

Appellants make no effort to explain how the Commission could rationally have prescribed new divisions to reflect "revenue needs" without those findings. Instead, appellants adopt the Commission's position that these basic findings are not required because the prescription of divisions is

within the discretion of the Commission.[3] The Commission defied the requirements of the Administrative Procedure Act by stating (B&O J.S. 134a-135a, 136a):

> "There is no rule, statutory or otherwise, requiring that, as a condition to the exercise of our authority in cases involving divisions, we must find in terms of dollar amount the difference between the revenue produced by lawful divisions as compared to the revenue produced by unlawful divisions."
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> " 'There is no requirement that the Commission specify the weight given to any item of evidence or fact or disclose mental operations by which its decisions are reached.' " (Quoting from *Baltimore & Ohio R. Co.* v. *United States,* 298 U.S. 349, 359-360 (1936)).

This is the sort of administrative double-talk upon which appellants are forced to rely in the absence of necessary findings. No one suggested that the Commission "disclose mental operations" or that it "specify the weight given to any item of evidence." What was requested was a finding that would relate the divisions prescribed by the Commission to the revenue needs such divisions were purportedly designed to reflect.

The uncontroverted fact is that the Commission did not

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[3] The assertion that the issue as to the lack of findings of the amount of revenue required and the financial effect of the prescribed divisions was first raised on petition for reconsideration (U.S. J.S. 17), is incorrect and irrelevant.

Before the case was argued to the Commission, appellee railroads listed these findings as "essential" because "No rational findings underlying a change in divisions based upon revenue need could be made without knowledge of the amount of revenues that would be transferred" (Exceptions dated April 5, 1961, p. 80).

Moreover, the Commission did not find any waiver of the request for essential findings but ruled on the merits that such findings were not required (B&O J.S. 134a-135a).

find the effect of its order upon the revenue needs of appellees in terms of dollar amount or in any other terms. The Commission could not rationally determine that new divisions are "lawful divisions" in light of revenue needs without finding what those needs would be under the new divisions. Not even the court decisions prior to the passage of the Administrative Procedure Act upheld administrative orders lacking such essential findings (*e.g., Florida* v. *United States,* 282 U.S. 194, 212, 214-215 (1931), cited as authority in the very *B&O* case cited out of context by the Commission).

Appellants present no substantial question for decision of this Court in their attempted defense of Commission action explicitly based upon cases decided prior to the passage of the Administrative Procedure Act, even if such cases did countenance the very sort of administrative behavior that the Act was passed to prevent. Whatever the law requiring findings during the 1930's when the cases relied upon by appellants were decided, this case was decided by the district court under the Administrative Procedure Act enacted in 1946. The district court reviewed the legislative history of Section 8(b) of the Act and correctly held that findings were required on issues as unquestionably material as those involved here. As to such issues, the district court quite properly concluded (B&O J.S. 12a) that the holding of this Court in *Chicago, Milwaukee, St. P. & P. R. Co.* v. *Illinois,* 355 U.S. 300, 309-310 note 8 (1958), has plain application:

> "It is axiomatic that to know whether something is a fair proportionate part of something else, we must be told what that something else is."

The district court has applied the Administrative Procedure Act in this case with specific reference to the absence of essential findings as to the amount of revenue required and the effect of the new divisions on those

revenue needs. This holding, applying a plain statutory mandate to the particular agency action before it, was clearly correct and raises no question of general importance.

There is no conflict of authority on this issue. In *Atchison, T. & S. F. Ry. Co.* v. *United States,* 225 F. Supp. 584 (D. Colo. 1964), a divisions proceeding between essentially the same carrier groups, the court set aside an order of the Commission for violating the Administrative Procedure Act. Speaking through Judge Doyle, the court held that the Commission had "made no findings based on revenue needs which would justify the action taken," where the Commission had not made findings as to "the relative revenue needs of the specific participating carriers" or as to "the principal effect" of the new divisions on the transcontinental lines (225 F. Supp. at 605-606, 607). No appeal was taken from that Judgment, and that proceeding is now pending before the Commission on remand.[4]

There is no genuine question of the Commission's ability to administer Section 15(6) on the basis of essential findings on these material issues. The Commission appeared before Congress to oppose the passage of the Administrative Procedure Act, making specific references to divisions cases.[5] Congress having considered and rejected the Com-

[4] In other divisions proceedings litigated in recent years, the Commission has found the financial effect of its orders even where the divisions at issue constituted only a small part of the carrier's revenues and where the Commission did not base its prescription of divisions upon the ground of revenue needs. *Louisville & N.R. Co.* v. *Akron, C. & Y. R. Co.,* 309 I.C.C. 491, 493 (1960), *upheld sub nom. Boston & Maine R. Co.* v. *United States,* 208 F. Supp. 661 (D. Mass 1962), aff'd. 371 U.S. 26 (1962); *Louisville & N.R. Co.* v. *Southern Ry. Co.,* 319 I.C.C. 639, 661 (1963), *upheld sub nom. Carolina & N.R. Co.* v. *United States,* 234 F. Supp. 112 (W.D. No. Car. 1964), aff'd. 380 U.S. 526 (1965).

[5] Hearings before the House Committee on the Judiciary, 78th Cong., 1st Sess., Sec. 19, pp. 78-80 (1945).

mission's plea for exemption from the Act,[6] the courts should not now accept an argument which amounts to a renewal of such a plea by appellants.

Furthermore, appellants' assertions that the making of essential findings would "seriously interfere with the Commission's administration of Section 15(6)" (U.S. J.S. 15) are unfounded. This need not be left to the speculation of counsel, for the Commission itself has provided the practical answer. After the decision of the District Court in this case, the full Commission decided another major interterritorial divisions case, *Official-Southern Divisions,* 325 I.C.C. 1 (1965). The Commission's report in that case was written by Commissioner Freas, who had dissented in the instant case on the ground that the Commission's order violated Section 8(b) of the Administrative Procedure Act (B&O J.S. 107a). The Commission's report in the *Official-Southern* case, unlike its report in this case, prescribed new divisions based upon findings which state, in dollars, the amounts of revenues required by the carriers, and which state, in dollars, the financial effect of the new divisions which were prescribed.[7]

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[6] S. Rep. No. 752, 79th Cong., 1st Sess., p. 5 (1945):

"The legitimate needs of the Interstate Commerce Commission, for example, have been fully considered but it has not been placed in a favored position by exemption from the bill."

[7] The Commission found, in dollars, the "Fully distributed cost-adjusted" for the "Official territory" and "Southern region" railroads (325 I.C.C. at 26), and thereafter found that the prescription of divisions on the basis of "fully distributed" costs "includes allowances for overhead and return, and in our judgment reflects a due proportion of the burden of maintaining the financial integrity and credit of the carriers involved" (325 I.C.C. at 49-50). (This also represents a reversal of the approach employed in the present case in which the Commission had expressly rejected fully distributed costs as a method of determining revenue needs (B&O J.S. 68a-69a)).

Whatever the propriety of the standard employed in the *South-*

The Commission itself has thus made it plain that the making of reasoned findings explaining its action, including a specific finding of the financial effect of new divisions, does not "seriously interfere" with its administration of Section 15(6) as appellants would have this Court believe in their overblown effort to have the Court prolong this litigation by granting plenary review of an erroneous order already repudiated by subsequent action of the Commission.

Accordingly, the Judgment of the District Court is clearly correct in setting aside the Commission's orders for violation of the findings requirements of the Administrative Procedure Act.

B. The Commission's Reports Do Not Provide a Rational Connection Between Any Facts Found and the Divisions Prescribed.

Although, as noted, the Commission justified its refusal to find the financial effect of its order on the theory that it need not "find in terms of dollar amount the difference between the revenue produced by lawful divisions as compared to the revenue produced by unlawful divisions" (B&O J.S. 134a-135a), it did not support with any adequate findings the derivation of its ultimate order prescribing new divisions. Consequently, there is a second and wholly independent ground for upholding the district court's condemnation of the Commission's orders as a violation of Sec-

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ern case for measuring the "amount of revenue required", the Commission did in fact state its findings on the subject in dollars without experiencing any "overwhelming burden of inquiry" which would "seriously interfere with the Commission's administration of Section 15(6)." (Compare U.S. J.S. 15). And the Commission experienced no difficulty in the *Southern* case in finding, in dollars, the financial effect of the new divisions which it prescribed (325 I.C.C. at 49-50).

tion 8(b) of the Administrative Procedure Act, for the Commission clearly failed in its duty under that Section by failing to "articulate any rational connection between the facts found and the choice made." *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 168 (1962). In a case such as this, in which tens of millions of dollars of annual revenues are at stake, it is particularly true that "the choice of remedy is as important a decision as the initial construction of the statute and finding of a violation." *Gilbertville Trucking Co.* v. *United States,* 371 U.S. 115, 130 (1962).

There is no reason for plenary review of this issue by this Court where it is plain that the ultimate order of the Commission under review is not supported by necessary reasoned findings. This is especially true in view of the fact that the Commission has, in its subsequent decision in *Official-Southern Divisions,* 325 I.C.C. 1 (1965), completely repudiated the construction of the very divisional sales prescribed in the instant case.

The "Scales of Divisional Factors" prescribed by the Commission in this case for application as between Mountain-Pacific and the Midwestern railroads are derived from the so-called "29886 scale", first used by the Commission in *Official-Southwestern Divisions,* 287 I.C.C. 553, 595 (col. 1) (1953) (I.C.C. Docket 29886). The 29886 scale is partly a distance scale, according each group of carriers a divisional factor which includes an allowance for the length of its haul (measured in 50-mile blocks). However, the scale also contains a terminal element equivalent to 221 miles of line-haul service, which is used to increase the factor of any group performing terminal service.[8] As prescribed

[8] The terminal element in the 29886 scale is calculated by subtracting the line-haul factor per 50-mile block (12 units as shown, for example in the Column 1 scale (B&O J.S. 167a) from the factor for the first 50-mile block (65). The resulting 53 units have

in this case, the 29886 factors were increased 10 per cent for application to hauls in Mountain-Pacific territory to reflect territorial differences in transportation conditions (B&O J.S. 104a, 145a, 167a).

A plain legal deficiency in the Commission's selection of divisional scales in this case is that there are no findings which relate in any rational manner the construction of the scales to the standards of Section 15(6) of the Interstate Commerce Act. Why is the prescribed terminal element equivalent to 221 miles of line-haul service? Why is an element equivalent to 112.5 miles of line-haul service included in the scale for intermediate carriers? To the extent that these elements are greater than justified, the Mountain-Pacific lines' revenues are substantially diminished, for these characteristics dilute the value of distance in the scale and the Mountain-Pacific lines are the carriers that generally have the longer hauls on the traffic at issue.

Moreover, there is no evidence which would even begin to justify these characteristics of the prescribed divisional scales on the basis of cost. The evidence most favorable to the Midwestern lines—the unadjusted territorial averages upon which the Midwestern lines relied—would justify a

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a value equivalent to 221 miles compared to the 12-unit factor for each 50-mile block. In this respect, the 29886 scale is identical to the scale described by the court in *Boston and Maine Railroad* v. *United States*, 208 F. Supp. 661, 667, note 7 (D. Mass. 1962), aff'd. 371 U.S. 26 (1962). A similar calculation with respect to the scale for intermediate carriers shows that the scale provides a factor of 27 units for carriers which perform no terminal service at all (B&O J.S. 167a col. 2). There are no findings in the Commission's reports or any evidence in the record which in any manner justify such an allowance for a carrier performing intermediate service.

terminal element equivalent to only 86 miles and no separate allowance for intermediate service (Exhibit MW-150).

In its supplemental report, the Commission expressly disavowed cost of service as the basis for the construction of the divisional scale which it prescribed (B&O J.S. 145a).[9] But, if the construction of the scale is not supported by costs, what is it supported by? What standards of Section 15(6) are invoked by the Commission in support of the divisional scales which it prescribed? The Commission's references in its supplemental report to "rate scales" and to dividing rates "in accordance with the way they are made" (B&O J.S. 145a-146a) are not related to any evidence in this case.[10] Nor are they related to any standard of Section 15(6).[11]

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[9] In this connection, the Commission relied upon *Boston & Maine Railroad* v. *United States,* 208 F. Supp. 661 (D. Mass. 1962), aff'd, 371 U.S. 26 (1962). That case does not condone a disregard of costs in the construction of divisional scales. The essential question in that case concerned the need for consistency in the application of a divisional scale to border areas of the territories for which that scale already had been prescribed. Even there, the Commission supported the use of a terminal allowance equivalent to 221 miles as providing "appropriate recognition to the terminal costs" shown in that record (309 I.C.C. 491, 510). The Commission's order was upheld on judicial review with specific reference to the cost evidence supporting that terminal allowance (208 F. Supp. at 667, 672).

[10] Indeed, the record shows that transcontinental rates are not made in relation to any distance scale (Exhibit T-294, p. 14).

[11] Incongruously, later in its supplemental report, the Commission found that the very scale which it had prescribed could not properly be applied to hauls over 1,200 miles (B&O J.S. 152a-153a). This finding condemns the Commission's own orders because the transcontinental shipments to which the Commission has or-

The plain truth is that no reasons have been suggested, and none exist, which would justify the excessive terminal and interchange factors in the divisional scales prescribed by the Commission in this case. Section 15(6) itself establishes the principle that the determination of terminal costs is a material issue, and the plain duty of the courts is to require that findings be made on such a material issue. This was the precise holding of *Atchison, T. & S. F. R. Co.* v. *United States,* 225 F. Supp. 584 (D. Colo. 1964), in which the court set aside an order of the Commission prescribing similar divisional scales. As Judge Doyle stated for the court (225 F. Supp. at 605, 607):

> "As to terminal costs, which the Act describes as 'whether any particular participating carrier is an originating, intermediate, or delivering line,' there is no consideration of this factor in the record, despite the fact that the parties all agree that the variation in terminal allowances between the 500-A and 28277 schedules is of strategic importance to all the carriers involved."
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> "Here the Commission failed to consider terminal costs, assumed the equality of efficiency and public interest, found relative costs of service 'unhelpful,' and made no finding based upon revenue needs which would justify the action taken. Thus we can only reach the conclusion that the 28277 scale was unlawfully prescribed."

For this same reason, the district court has properly held

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dered the scale to apply have hauls in Mountain-Pacific territory which commonly exceed 1,200 miles and in some cases exceed 2000 miles. The railroad mileages between Denver and Los Angeles, San Francisco, and Eugene are 1,252 miles, 1,354 miles and 1,481 miles, respectively, and the mileages between El Paso and San Francisco, Eugene, Portland, Spokane and Seattle are 1,218, 1,706, 1,829, 1,925 and 2,007 miles, respectively (Exhibit MW-73, pp. 7, 28; Exhibit MW-74, pp. 7, 12).

that the divisional scales prescribed in this case were not properly supported by findings relating those scales to the standards of Section 15(6).

In addition, the 29886 scale embodied in the Commission's decision before this Court is an anachronism. Subsequent to the Judgment of the court below, the Commission itself recognized that the scale prescribed in this case cannot be justified under the standards of Section 15(6). In *Official-Southern Divisions,* 325 I.C.C. 1 (1965), the Commission expressly condemned the construction of the very same divisional scale on the ground that it "unlawfully depresses the revenues of the long-haul carriers" (325 I.C.C. at 37).

With respect to its prescription of a 15 percent minimum division, the Commission found that division to be justified by "increasingly burdensome terminal costs" and the practice in previous divisions cases (B&O J.S. 100a-101a). This finding is not supported by substantial evidence. Indeed, it is not supported by any evidence at all, but is directly contrary to the most favorable evidence in the record on this point from the standpoint of railroads serving the short-haul areas of Southeastern Illinois, in which the 15 percent minimum applies.[12] And there is no case in which a 15 percent minimum was prescribed for short-hauls where the overall haul even approached the distances involved in this case.

As in the case of the 29886 scale discussed above, the Commission has since repudiated the 15 percent minimum.

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[12] This evidence, cited by Government counsel in the district court, would not have justified a minimum division in excess of 7% (Gov't brief in district court, p. 60; Reply Brief of Plaintiffs in district court, pp. 49-50; these briefs are included in the record on appeal filed in this Court).

In the *Official-Southern Divisions* case, the Commission held that a properly constructed divisional scale "gives each type of haul its proper share, and, therefore, no special protection for short hauls is warranted"; accordingly, the 15 percent minimum was expressly rejected (325 I.C.C. at 38). The Commission's treatment of this issue in the *Official-Southern* case is in harmony with the holding of the district court below that the Commission must make findings which support the lawfulness of each division prescribed (B&O J.S. 14a-15a), and further demonstrates the complete correctness of that holding.

C. Appellants' Argument That the Divisions Prescribed By the Commission's Order May Be Sustained on the Basis of Costs Alone is Improper and Groundless.

In suggesting that the Commission's findings with respect to costs are sufficient to sustain its order (U.S. J.S. 16), the Government is asking this Court to uphold the divisions prescribed by the Commission on a basis different from that adopted by the Commission itself. The Commission did not find that the divisions which it prescribed were based upon costs. Quite the contrary, the Commission explicitly stated that the cost evidence *"does not provide an acceptable pattern for readjusting the existing divisions, which must reflect certain broader aspects of revenue need"* (B&O J.S. 95a).[13] And the Commission expressly disavowed costs as the basis for constructing the divisional scales which it prescribed (B&O J.S. 145a).

This Court does not pass upon the merits of arguments of counsel which attempt to support Commission orders

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[13] This again highlights the dilemma of appellants which arises from the Commission's failure to find the effect of its order upon the revenue needs of appellees in terms of dollar amount or in any other terms.

in disregard of the grounds invoked by the Commission itself. As the Court ruled in *S.E.C.* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947):

> "'[A] simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper the court is powerless to affirm the administrative action . . .'" *Ibid.*

This rule was reaffirmed with specific reference to review of orders of the Interstate Commerce Commission under the Administrative Procedure Act in *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 168-169 (1962). Last Term, the Court reaffirmed these rulings in *N.L.R.B.* v. *Metropolitan Life Ins. Co.,* 380 U.S. 438, 443-444 (1965):

> ". . . the integrity of the administrative process requires that 'courts may not accept appellate counsel's post hoc rationalizations for agency action. . . .' Burlington Truck Lines v. United States, supra, 371 US at 168; see Securities & Exchange Comm'n v. Chenery Corp. 332 US 194, 196. For reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review. Such action would not vindicate, but would deprecate the administrative process for it would 'propel the court into the domain which Congress has set aside exclusively for the administrative agency.' Securities & Exchange Comm'n v. Chenery Corp., supra, 332 U.S. at 196."

Appellants' arguments seek to propel this Court into the Commission's domain by asking this Court to support the Commission's order on the basis of costs alone although the Commission expressly stated that it rejected costs and

had fashioned the new divisions with the express purpose of reflecting revenue needs. Such arguments do not warrant plenary review in this Court.

Moreover, and in any event, the Government's argument refers only to the Eastern railroads' divisions, and there are no facts cited in the Commission's reports which would in any way support a claim that costs alone can support the divisions prescribed for the Midwestern railroads. As shown above (pp. 16-17, *supra*), costs do not justify the construction of the prescribed divisional scales which strongly favor the short-haul Midwestern lines as against the long-haul lines serving Mountain-Pacific territory. And the Commission made no comparison, even in the aggregate, between the costs of the Midwestern railroads and their revenues under the prescribed divisions.

Finally, it is significant that none of the active appellants has asked this Court to pass upon the several substantial issues raised by appellees in the district court with respect to the Commission's cost determinations but which that court did not find it necessary to reach. Appellees showed in the court below that the Commission's use of average costs of handling *all* freight traffic in lieu of the actual costs of handling the transcontinental freight traffic in issue was arbitrary, unsupported by necessary findings or substantial evidence and otherwise unlawful in a number of separate and specific respects. The Commission's approach to the cost issues was in flagrant disregard of the principle that the Eastern and Midwestern railroads, as proponents of an increase in their divisions and having possession of the facts with respect to the actual cost of handling transcontinental traffic over their lines, have the duty to come forward with those costs. *I.C.C.* v. *New York, N.H. and H.R. Co.*, 372 U.S. 744, 760 note 12 (1963); *Boston*

& Maine Railroad v. *United States,* 208 F. Supp. 661, 675-676 (D. Mass. 1962), aff'd. 371 U.S. 26 (1962).

The district court found it "unnecessary to discuss issues 20 to 30" (relating to costs) in view of its conclusions with respect to prior issues (B&O J.S. 20a). If reached, consideration of these issues would require full argument on the factual context in which each issue arose in the determination of costs by the Commission. If the Commission had based the divisions which it prescribed upon costs, and the legal issues raised by the cost findings were properly before this Court, review of these issues would constitute a most important piece of litigation by itself.[14] Appellants' attempt to have this Court brush off these significant questions is squarely contrary to "the practice of this Court not to review an administrative record in the first instance." *United States* v. *Great Northern R. Co.,* 343 U.S. 562, 577-578 (1952). Accord: *Seaboard Air Line R. Co.* v. *United States,* 382 U.S. 154 (1965).

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[14] In *Official-Southern Divisions,* 325 I.C.C. 1 (1965), the Commission did base the prescribed divisions upon its findings with respect to costs (325 I.C.C. at 37, 49-50), even though the differences in rates of return as between Southern and Eastern railroads in that case (325 I.C.C. at 14) were greater than the differences as between Western and Eastern railroads in the present case (B&O J.S. 77a, 88a).

As here, the cost findings used to construct the divisions prescribed in the *Official-Southern* case reflect the use of the average cost of all traffic instead of the cost of the traffic subject to the divisions at issue (see dissenting opinion, 325 I.C.C. at 53). The *Official-Southern* case thus presents legal issues similar to those raised with respect to the Commission's cost findings in this case but not reached by the District Court. These legal issues are the subject of an action brought by the Southern railroads and the Southern Governors' Conference now pending before a three-judge court in the Eastern District of Louisiana, *Aberdeen & Rockfish R. Co.* v. *United States* (Civil Action No. 15454).

II. APPELLANTS DISTORT AND MISCONSTRUE THE DISTRICT COURT'S DECISION IN AN EFFORT TO PRESENT A SUBJECT FOR PLENARY ARGUMENT BEFORE THIS COURT.

The Commission's order is manifestly lacking in essential findings with respect both to the carrier groups involved and to the particular divisions prescribed for those groups. Yet appellants deal primarily with a separate phase of the case—the necessity for findings with respect to individual carriers. As to this issue, which would not save the Commission's order however it was decided, appellants resort to the scare technique of claiming that the decision of the district court would impair the Commission's administration of Section 15(6) by requiring separate findings with respect to each and every one of the 300 individual carriers. To make this argument, appellants are obliged to tear the opinion of the district court completely away from the context in which it was decided.

This is not a case in which the Commission has made a uniform adjustment in divisions which may be assumed to affect all carriers in a like manner. The new divisions prescribed by the Commission are radically new percentages and scales which affect divisions on individual shipments in an entirely new and disparate manner.[15] The Commission did not, and could not, make any finding that these

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[15] The Government's bland assertion that "the Commission reapportioned divisions, using modifications of the existing formulas agreed to by the carriers" (U.S. J.S. 16) gives a wholly misleading impression of the Commission's action. The prescribed divisional scales would increase the Midwestern divisions on some shipments as much as 96%, while other Midwestern divisions would be increased to a much lesser degree or even reduced.

This approach may be contrasted with *New England Divisions*, 261 U.S. 184, 187, 196 (1923), in which the Commission's order changed all existing divisions by a uniform 15 percent increase.

new divisions would have a uniform impact upon the individual members of the carrier groups.

The individual carrier issue arose in this case when three (not 300 but 3) carriers claimed before the Commission that the prescribed divisions structure would have a disproportionate and unique impact upon their revenues. (The three carriers were the Denver & Rio Grande Western Railroad Company (Rio Grande), the St. Louis-San Francisco Railway Company (Frisco), and the Missouri-Kansas-Texas Railroad Company (Katy)). The question presented by the district court's holding that these three carriers' individual situations should have been considered is *not* whether, in every case, the Commission must make separate findings with respect to the revenue needs of each and every individual carrier. Rather, the question is whether the Commission may refuse to consider the impact of its order upon an individual railroad no matter how extreme and how atypical the effect of the order may be upon that railroad.

Section 15(6) by its terms requires that the determination of divisions be made upon consideration of the situation of individual carriers. The Section provides that the Commission shall determine divisions "as between the carriers party thereto," and prescribe divisions "to be received by the several carriers," after considering the circumstances of "one carrier" relative to "another carrier." (49 U.S.C. § 15(6)).

In divisions proceedings involving many carriers, the Commission may determine and prescribe divisions on the basis of evidence relating to groups of carriers. The whole premise of this practice of considering divisions on a group basis, however, is that the Commission acts on the basis of evidence which is *typical* of the situations of the individual carriers embraced in each group. As the Court

stated in *New England Divisions* 261 U.S. 184, 196-197 (1923):

> "It is asserted that the order is necessarily based upon the theory that, under § 15(6), the Commission has authority to fix divisions as between groups of carriers without considering the carriers individually; that Congress did not confer such authority; and that, hence, the order is void. Whether Congress did confer that authority we have no occasion to consider; for it is clear that the Commission did not base its order upon any such theory. The order directs a 15 percent increase in the divisions to the several New England lines. It is comprehensive. But it is based upon evidence which the Commission *assumed was typical* in character and ample in quantity to justify the finding made in respect to each division of each rate of every carrier. Whether the *assumption* was well founded will be discussed later." (emphasis supplied).

Appellants' arguments presume that Mr. Justice Brandeis' opinion in *New England Divisions* allows the Commission to disregard the situation of individual carriers whether or not the group evidence was, in fact, typical. Any such notion was quickly dispelled by the opinion of Mr. Justice Brandeis in *United States* v. *Abilene & So. Ry.*, 265 U.S. 274, 291 (1924):

> "The power conferred by Congress on the Commission is that of determining, in respect to each joint rate, what divisions will be just. Evidence of individual rates or divisions, said to be typical of all, affords a basis for a finding as to any one. But averages are apt to be misleading. It cannot be inferred that every existing division of every joint rate is unjust as between particular carriers, because the aggregate result of the movement of the traffic on joint rates appears to be unjust."

These and subsequent decisions, cited in the district court's opinion (B&O J.S. 13a-18a), make it plain that

the Commission may base its decision upon evidence relating to groups of railroads only upon a finding, supported by evidence, that the situation of the group is *typical* of the situation of the individual railroads within that group.[16]

The Commission did not find, and appellants do not contend, that the situation of any carrier group was typical of the situation of the Rio Grande, Frisco and Katy. The Commission's order prescribed new bases of divisions, applied in a way not proposed by any party nor recommended by the Examiners, that would have a unique impact on these three railroads.[17] Because the new divisional structure split competitive routes, the Rio Grande would be caught in a special competitive squeeze that would deprive it of substantially all of its net income.[18] The Frisco and Katy are in the particularly ironic position of having been members of the Midwestern group that the Commission found was entitled to "moderate increases" (B&O J.S. 104a), and yet the Commission's order actually would produce reductions in their divisions.

Under such special circumstances, the financial impact of the new divisions on these three railroads became a "material issue" upon which the Commission was required to make

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[16] In *Boston & Maine Railroad* v. *United States*, 208 F. Supp. 661, 674-675 (D. Mass. 1962), relied upon by the Midwestern appellants (C&NW J.S. 11-12, 16), there was no claim that the situation of the individual railroad in question was any different from that of the group of railroads of which it was a member.

[17] This issue has nothing to do with subdivisions. As the district court held (B&O J.S. 17a-18a), the question is the impact that the Commission's prescription of primary divisions would have upon these individual carriers.

[18] The Commission did not deny that this would be the effect of its orders under the issues as fixed by the pleadings; the Commission said only that a different order might have had a different impact if the issues had been different (B&O J.S. 147a).

findings under the Administrative Procedure Act. Making such findings with respect to these three railroads can hardly be regarded as a task which would interfere with the administration of Section 15(6) in this case.

Nor would the holding of the district court that the Commission must make findings on material issues on this record interfere with the Commission's administration of Section 15(6) in other cases. If the Commission finds in any case that evidence covering carrier groups is typical of the situations of the individual carriers in each group (and that finding is supported by evidence), such a finding will in the future, as it has in the past, justify the prescription of divisions on the basis of group evidence.

The Commission had no difficulty in administering Section 15(6) in this manner in *Official-Southern Divisions*, 325 I.C.C. 1 (1965). In that case, the Commission dealt with the divisions on a group basis upon a finding that the group evidence was generally typical of the carriers in each group (325 I.C.C. at 5-6). However, with respect to one carrier whose situation was different, the Commission made separate findings as to the financial effect of its action upon that carrier (the Norfolk Southern) (325 I.C.C. at 40-45). Commissioner Freas summarized the Commission's current policy as follows (325 I.C.C. at 450):

> "Since the enactment of section 15(6) as part of the Transportation Act of 1920, it has been our policy in interterritorial divisions cases to employ a group method or system of determining just, reasonable, and equitable divisions. Because of the number of carriers and the numerous rates and divisions involved, the actual necessities of procedure and administration have required the adoption of such a method in order to accomplish the task imposed upon the Commission by Congress. *New England Divisions Case*, 261 U.S. 184, 196-9 (1923). To avoid serious injustice to any

> carrier, our procedures permit any railroad to be excepted from a group order, in whole or in part, on a proper showing of differing circumstances. Where it is demonstrated by competent and reliable evidence that a carrier's financial or revenue needs situation requires the preservation of its share of the joint rates on the same level as presently existing or at a level different than that to be maintained for the group as a whole, we may provide special individual treatment in order to maintain such carrier as part of the Nation's transportation system without regard to its costs of rendering the service."

This approach is to be contrasted with the callous disregard of the financial impact of its orders in this case upon the Rio Grande, Frisco and Katy. These three carriers are also a part of the "Nation's transportation system," and the Commission cannot lawfully refuse to find the effect of its orders upon these three railroads in a case in which it did not, and could not, find that the impact of its order upon each group of railroads was typical of the impact of its order upon these three railroads.

The Government casually refers to "the Commission's procedure enabling an aggrieved carrier to exempt itself from the order upon a proper showing" (U.S. J.S. 12). No such "procedure" was acknowledged by the Commission in this case. If the Commission had expected to give one of these three railroads relief from its orders in some subsequent proceeding, how did it expect such a railroad to survive in the interim without net income? Such questions are simply brushed under the rug by the Commission's refusal to find the effect of its orders on the revenues of three individual carriers whose situations are admittedly not typical of the carrier groups.

Moreover, the above-quoted portion of the *Official-Southern Divisions* report makes it plain that the Com-

mission itself does not require a procedure which forces an aggrieved carrier to suffer without individual consideration of its peculiar situation until an exemption can be obtained. There the Commission dealt with the individual situation of the Norfolk Southern *before* making effective a general divisions order which would have ruined that railroad. Quite plainly, it should have done the same thing here with respect to the Rio Grande, the Frisco and the Katy.

The fact that the Rio Grande, Frisco and Katy did not present a case for special treatment at the hearings has no significance where, as here, the situation of these three railroads became unique only as a result of the structure of the divisions prescribed by the Commission in its first report. The question of the effect of the Commission's orders upon these three individual carriers was raised at the earliest opportunity following the report of the Commission that inflicted the special injury.[19] As a matter of practical administration, a requirement that a carrier must make a special individual case at the hearings to guard against the possibility that some feature of the Commission's subsequent order might have a special impact on that carrier would produce the very proliferation of evidence as to each and every carrier over which appellants express such concern.

In the actual context of the precise issue decided, it is plain that the district court was dealing only with the material issues in the case before it. The decision of the district court therefore requires only that the Commission

[19] Appellants' assertion that the Frisco and Katy limited their claim in the district court to "efficiency," as contrasted with the "revenue needs" factor of Section 15(6) (C&NW J.S. 13 note 11) is incorrect. In their Complaint, and in their Brief in the district court (pp. 13-24), the Frisco and Katy placed primary reliance upon the Commission's failure to make findings with respect to revenue needs.

make findings as to the financial effect of its orders upon the three railroads whose claims of atypicality are not controverted. The specific holding of the district court that these three specific railroads, and only these three railroads, had not waived their rights to individual consideration (B&O J.S. 19a) makes it apparent that no such separate findings are required on remand as to any of the other 300 individual railroads.

The opinion of the district court, properly construed in the context of the issues before it, does not mean what appellants now claim it means. Appellants' strained and erroneous construction of that opinion does not provide any basis for plenary argument in this Court.

III. PLENARY REVIEW OF THE DECISION OF THE DISTRICT COURT IS NOT WARRANTED WHERE, AS HERE, THE COMMISSION'S ORDER IS PATENTLY UNLAWFUL ON A GROUND NOT EVEN CHALLENGED BY APPELLANTS.

The points relied upon by appellants to attack the decision of the district court are thus each shown to be unsound. In addition, an independent ground requiring affirmance of the district court's decision arises from the fact that none of the active appellants has challenged the correctness of the district court holding that the Commission erred in its reliance upon data which did not reflect revenue needs from all transportation services but, instead, excluded revenue needs represented by passenger deficits. Since this error constitutes an independent ground for setting aside the Commission's orders in this case, plenary review of the district court's judgment would not be warranted even if one or more of the questions which are presented were held to be substantial.

Before the district court, it was shown that the Commis-

sion's reliance upon the revenue needs of that part of the railroads' operations "as freight carriers" was contrary to Section 15(6), unsupported by rational findings, arbitrary, and denied appellees a fair hearing on this novel concept injected into the case for the first time by the Commission's Examiners.[20] Appellants do not address themselves to any of these legal errors inherent in any reliance upon revenue needs excluding passenger deficits but, instead, seek to avoid these issues by pretending that the Commission never relied upon this concept (C&NW J.S. 16-17). But the district court, having the primary responsibility for review of the Commission's orders, took the contrary view when it set aside the Commission's order and remanded the cause to the Commission with directions to consider "the revenue needs of the carriers from *all* transportation services, including needs represented by passenger deficits" (B&O J.S. 20a). Appellants cannot rationally complain of such a remand where they raise no questions in this Court with respect to this ground of the district court's decision.

This ground is clearly correct. The Commission, in its initial report, based such conclusions as it made concerning the subject of revenue needs on the relativity of revenue needs "as freight carriers" (B&O J.S. 88a). Any doubt as to the Commission's reliance upon this erroneous concept was removed by the Commission's supplemental report in which the Commission expressly stated that elimination of passenger deficits was "important" to its decision (B&O J.S. 141a) and made it entirely plain that it relied upon revenue needs "as freight carriers," as contrasted with "income from all services" (B&O J.S. 143a). But this approach to the question of revenue needs lacks any rational foundation. Since the passenger deficits in question reflect many expenses which could not be avoided if passenger

[20] Brief of Plaintiffs in the district court (pp. 46-83), included in the record on appeal filed in this Court.

service were abolished altogether,[21] such deficits cannot be assumed to constitute a potential source of revenue to appellee railroads. Thus the Commission's reliance upon the existence of these deficits to discount the revenue needs of the Mountain-Pacific railroads has no rational basis. In any event, the Commission's reports lack any reasoned findings necessary to support the Commission's theory.

The Commission's theory in this case of excluding passenger deficits was repudiated in *Official-Southern Divisions,* 325 I.C.C. 1, 49, 77-78 (1965), in which the Commission based the divisions which it prescribed upon data which include and reflect passenger deficits.

In any event, this Court should not grant plenary review of the decision below where no question at all has been presented with respect to this independent ground of the district court's decision. Rule 15(c)(1) of the Revised Rules of this Court expressly provides that "Only the questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the court." The omission of any question in any way related to the Commission's erroneous reliance upon passenger deficits in the jurisdictional statements of the active appellants necessarily means that the Judgment of the district court setting aside the Commission's orders upon that ground will stand regardless of the substantiality of other questions presented. In this situation, plenary review of this case is plainly not warranted.

IV. THE CONTENTION OF THE MIDWESTERN RAILROADS THAT THE DISTRICT COURT SHOULD HAVE RETAINED JURISDICTION IS WITHOUT SUPPORT IN LAW.

The Midwestern railroads, appellants in No. 159, contend that the district court erred in setting aside the portions

[21] See *King* v. *United States,* 344 U.S. 254, 265 (1952).

of the Commission's orders finding the present divisions unjust, and in remanding the cause to the Commission without retaining jurisdiction to require resettlement of revenues in the event of a further order of the Commission on remand (C&NW J.S. 4-5, 22). The first phase of this contention is a play on words. The errors of the Commission infect its findings with respect to the lawfulness of the present divisions as well as its prescription of new divisions. This is necessarily the case because the standards of Section 15(6) apply equally to the determination of the lawfulness of existing divisions and to the prescription of new divisions, and the Commission dealt with both issues in the same manner (e.g. B&O J.S. 134a). The second phase of Midwestern appellants' contention is an effort to have this Court speculate on the equitable jurisdiction of a court "in the event of a further order of the Commission" (C&NW J.S. 22). The district court properly refused to speculate on this subject in its opinion (B&O J.S. 21a), and it properly refused to speculate on this subject in its Judgment setting aside the Commission's orders. The action of the district court was in full accord with the decision of this Court in *Lehigh Valley Cooperative* v. *United States*, 370 U.S. 76, 79 (1962), and cases cited therein.

V. APPELLANTS ARE PRECLUDED FROM CLAIMING THAT THE ERRORS RELIED UPON BY THE DISTRICT COURT IN SETTING ASIDE THE COMMISSION'S ORDERS WERE NOT PREJUDICIAL.

In the "List of Issues Remaining in Controversy" dated October 21, 1964, prepared and stipulated to by all of the parties to this proceeding pursuant to a pretrial order of the district court, plaintiffs-appellees raised 29 separate issues, each of which was relied upon as an independent basis for setting aside the order of the Commission. De-

fendant-appellants defended the Commission's action on all issues and, as a separate defense, claimed with respect to twelve of the issues that, even if erroneous, the Commission's action was not prejudicial (issue No. 30). As to the other seventeen issues (Nos. 1-8, 13-15, 17-19, 23 and 27), no such question was raised. Thus, it was conceded that, if the Commission's action was erroneous with respect to those specific issues, the Commission's order should be set aside without the necessity of reaching any further question as to whether these errors were prejudicial. The opinion of the district court constitutes a ruling in favor of appellees on "a majority of issues 1 to 19" (B&O J.S. 20a). The district court did not reach issues Nos. 8, 12, 13 or any of the issues relating to cost of service (issues 20-29).

The issues as to which the absence of prejudicial error was claimed do *not* include issues 1-5 dealing with the Commission's lack of findings with respect to revenue needs, and do *not* include issues 14, 15, 17, 18 and 19, relating to the Commission's treatment of passenger deficits. Accordingly, appellants' contentions in this Court that errors of the Commission with respect to these issues were not prejudicial (C&NW J.S. 4), violate the pretrial stipulation. As to these issues, the Court should refuse to consider any question other than whether error was committed. Since it is clear that legal error was committed, the district court was plainly correct in setting aside the Commission's orders.

CONCLUSION

The district court has applied the Administrative Procedure Act to the particular administrative orders at issue in full conformity with statutory standards and the decisions of this Court. Furthermore, the Commission's action in this case is an anachronism in view of the subsequent decision of the Commission in *Official-Southern Divisions*,

325 I.C.C. 1 (1965). Accordingly, the judgment of the district court should be affirmed without argument.

Respectfully submitted,

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February 15, 1966

Appendix A

List of Appellees on whose Behalf this Motion to Affirm is filed

The Atchison, Topeka and Santa Fe Railway Company
Beaver, Meade and Englewood Railroad Company
Butte, Anaconda & Pacific Railway Company
Camas Prairie Railroad Company
Central California Traction Company
Colorado and Wyoming Railway Company
Great Northern Railway Company
Gulf, Colorado and Santa Fe Railway Company
Longview, Portland & Northern Railway Company
Los Angeles Junction Railway Company
Missouri-Kansas-Texas Railroad Company
Modesta and Empire Traction Company
Nevada Northern Railway Company
Northern Pacific Railway Company
Oregon, California & Eastern Railway Company
Oregon Electric Railway Company
Oregon Pacific and Eastern Railway Company
Oregon Trunk Railway
Pacific Coast R.R. Co.
Panhandle and Santa Fe Railway Company
Portland Traction Company
Quanah, Acme & Pacific Railway Company
Sacramento Northern Railway Company
Salt Lake, Garfield and Western Railway Company
Spokane International Railroad Company
Spokane, Portland and Seattle Railway Company
St. Louis-San Francisco Railway Company
Stockton Terminal and Eastern Railroad
Sunset Railway Company
Tidewater Southern Railway Company
Tooele Valley Railway Company
Union Pacific Railroad Company
Utah Railway Company
Walla Walla Valley Railway Company
The Western Pacific Railroad Company
Yakima Valley Transportation Co.